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**From:**

**Sent:** Thursday, March 04, 2010 3:32:58 PM

**To:**

**Cc:**

**Subject:** Re: Response from Office of Associate Chief Counsel ( ) - 9100 relief

If either the taxpayer has not extended the statute of limitations, all parties have not amended their inconsistent returns, or both, the requirements of Rev. Proc. 2003-33 have not been satisfied. Therefore, the taxpayer does not have an extension of time under section 9100 to make the section 338(h)(10) election.

Section 9100 relief is premised on a taxpayer demonstrating, among other things, that granting an extension of time will not prejudice the interests of the government. The extension of the statute of limitations and the amendment of inconsistent returns go directly to the prejudice issue.

If the election had been timely made, all returns would have been, or should have been, filed consistent with a section 338(h)(10) election having been made. Often, a section 338(h)(10) election is beneficial to one side of the transaction while detrimental to the other side. Accordingly, the purchase price is generally negotiated based on whether an election will or will not be made, and the purchase agreement generally mandates whether or not an election will be made.

Assume that the making of a section 338(h)(10) election will ultimately reduce the buyer's tax liability by \$25 but will increase the seller's tax liability by \$10. In the aggregate, making the election should benefit the buyer and seller by \$15. That is a perfectly acceptable reason for taxpayers to make a section 338(h)(10) election.

However, if section 9100 relief is granted to make the election, but all parties to the election don't amend any inconsistent returns, the buyer may claim the \$25 tax benefit of the election but the seller may not be subjected to the \$10 tax detriment of the election. That is, the buyer and seller may claim an aggregate \$25 tax benefit, when the aggregate benefit should only be \$15. Thus, by both not amending returns to eliminate the inconsistent treatment and not extending the statute of limitations to give the Field adequate time to examine all relevant returns, the sellers may not be subjected to the \$10 tax detriment. Section 301.9100-3(c)(1)(i) clearly provides that in determining whether the government's interests are prejudiced, the tax liability of all

affected taxpayers, in the aggregate, are taken into account. Thus, the government's interests would be clearly prejudiced.

Accordingly, section 9100 relief is not granted pursuant to Rev. Proc. 2003-33, nor, under the above described scenario, would relief be granted through a letter ruling issued by the National Office.